Neutral Citation No: [2013] NIQB 19 | *Ref:* **GIR8753**

Judgment: approved by the Court for handing down | *Delivered:* **22/02/13**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

IN THE MATTER OF AN APPLICATION UNDER THE EXTRADITION ACT 2003

BETWEEN

LITHUANIA

Applicant/Appellant

v

LIAM CAMPBELL

Defendant/Respondent

_____

Morgan LCJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (DELIVERING THE JUDGMENT OF THE COURT)

Introduction

[1] This is an appeal by the Republic of Lithuania which seeks the extradition of Liam Campbell ("the requested person") on suspicion of involvement in terrorist offences on foot of a European Arrest Warrant ("the EAW") which on 15 December 2008 was issued by the First District Court of Vilnius. An EAW was also issued in the Republic of Ireland. He was arrested on foot of that warrant in that jurisdiction and proceedings were commenced there to extradite him to Lithuania. He was granted bail in those proceedings. In breach of the terms of the bail he left the Republic and came into Northern Ireland on 22 May 2009. He was initially arrested here under the provisions of the Terrorism Act but was released after four days whereupon he was immediately arrested on foot of the EAW. He appeared before His Honour Judge Burgess ("the judge") on 27 May 2009.

[2] An argument was raised before the judge that because the proceedings in the Republic were ongoing it would be an abuse of process for a Northern Ireland court to entertain extradition proceedings. The judge's ruling that he had jurisdiction and that the case should proceed was the subject of an appeal to the High Court. The Divisional Court dismissed the requested person's application. Subsequently the Republic of Lithuania withdrew the application against the requested person in the Republic. The judge rejected a further application to have the Lithuanian application struck out as an abuse founded on the argument that Lithuanian authorities were guilty of abusive forum shopping.

[3] The requested person argued before the judge that his extradition should not be ordered because if he were returned to Lithuania on foot of the EAW his convention rights would be infringed. Firstly he contended that in breach of Article 6 of the convention he would not be able to obtain a fair trial. Secondly, he argued that if returned to Lithuania there were strong grounds for believing that he was likely to be subjected to torture and/or inhuman and degrading treatment in breach of Article 3. In particular he claimed that the conditions in which he would be detained would be inhuman and degrading. He also argued that his extradition would breach his Article 8 rights.

[4] The judge concluded that the requested person could not surmount what the judge described as the high hurdle which he had to overcome if he was to establish that he was at risk of suffering a flagrant denial of his Article 6 rights in Lithuania. Before this court Mr Macdonald QC on behalf of the requested party submitted that the judge had not completed the hearing of the case insofar as the requested person relied on a breach of Article 6 and Article 8 rights and that the judge could not properly have reached a conclusion on the argument that Article 6 would not be breached. His ruling was in effect premature.

[5] The judge, however, did conclude that he was satisfied on the evidence that to extradite the requested person would lead to a breach of Article 3 of his Convention rights and thus be in breach of the provisions of Section 21 of the Extradition Act 2003.

[6] It is clear that the hearing of this case before the judge took place over a protracted period and was the subject of many interruptions and adjournments. Such a state of affair is quite undesirable in relation to a matter which involves the liberty of the subject and relates to an extradition process which is clearly intended to be conducted with dispatch and according to tight statutory timetables. There is insufficient information before the court to reach a conclusion as to why the case took the length of time which it did. It would appear that delays were at least in part the result of applications by the requested person who was seeking further information in Lithuania, who wished to obtain a witness or witnesses from that jurisdiction and wished to await the outcome of the trial of the requested person's brother in Lithuania on similar charges. Whatever the reason for the delay, if the judge was correct in his conclusion that a breach of Article 3 was established, he

rightly discharged the applicant. This would render it unnecessary for this judge or an alternative judge to hear further argument and evidence in relation to the Article 6 issue. Having regard to the protracted timescale of the hearing before the judge at first instance and the reasons for it it is clear that the appeal could not be heard within the time prescribed by the Act and Order 61A. We concluded accordingly that it was necessary in the interests of justice to extend the time for the commencement of the hearing of the appeal to the date on which the appeal was heard before us.

The judge's conclusions

[7] In reaching his conclusions the judge expressed himself as having applied the test in Soering v United Kingdom (1989) EHRR 439, posing for himself the question whether there were substantial grounds for believing that the requested person, if extradited to the requesting state (Lithuania), would be faced by a real risk of exposure to inhuman and degrading treatment or punishment proscribed by Article 3. He considered that it is a test which involves an assessment of conditions in the requesting state against the standards of Article 3. What Article 3 does is to impose liability on the extraditing contracting state by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill treatment. While the judge recognised that he was reaching a different conclusion from that reached by the court in Janovic v Prosecutor General's Office v Lithuania [2011] EWHC 710 he considered that he should in his own right examine the evidence before the court. This, inter alia, comprised of reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") and the written and oral testimony of Professor Morgan who is (inter alia) professor emeritus of criminal justice in the Department of Law, Bristol University; a former Chief Inspector of Probation; co-author of the Official Council of Europe's Guide to the Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment; who has advised the CPT, Amnesty International and the ICRC; and is a member as an expert adviser of the Council of Europe CPT which visited Lithuania in February 2000. He had first-hand experience of custodial conditions in Lithuania and visited Lukiskes Prison ("the relevant prison") when he interviewed the requested person's brother who has been held in that prison as a remand prisoner since February 2008. The judge took account of a finding of the European Court of Human Rights in Savenkovas v Lithuania [2008] ECHR 1456 that Lithuania was in breach of Article 3 in respect of the conditions in which the prisoner in that case was held in the relevant prison. He regarded that decision as a useful starting point given the evidence from the CPT reports and that of Professor Morgan which traced developments since 2000 until 2010. In the judge's view these developments showed no improvement particularly in relation to the issue of severe overcrowding in the relevant prison. Professor Morgan's evidence which the judge clearly accepted showed that matters were deteriorating, not improving from 2008. The judge noted that the requesting state did not counter the evidence given particularly by Professor Morgan generally and particularly in light of what was found in 2010 by Professor Morgan during his visit and what he was

told by the Director of the relevant prison. Applying the test in Soering, he found that the requested person had satisfied the court that to be returned to Lithuania would expose him to a real risk that he would be subjected or likely to be subjected to inhuman and degrading treatment by reason of the prison conditions in Lithuania.

The parties' submissions

[8] Mr Simpson QC who appeared with Mr Ritchie on behalf of the applicant submitted that a central theme running through the authorities that deal with challenges based on convention rights is that there is a strong presumption that Category 1 states (of which Lithuania is one) will fulfil their Convention obligations and secure to everyone within their jurisdiction their rights and freedoms (KRS v UK App No 32733-08 2 December 2008, Targosinski v Poland [2011] EWHC 312 (Admin), Agius v Court of Magistrates Malta (2011) EWHC 759). To rebut the presumption the burden rested on the requested person to adduce clear and cogent evidence to show substantial grounds for believing that he faced a real risk of being subjected to inhuman and degrading treatment (Soering v UK [1989] 11 EHRR 439, R (Ullah) v Special Adjudicator (2004) 2 AC 323 and Rozantiene v The Republic of Lithuania [2009] NIQB 3). The judge wrongly circumvented the lack of up to date evidence and his conclusion was speculative. Professor Morgan's evidence had not persuaded the English Divisional Court in Janovic v Prosecutor General's Office Lithuania [2011] EWHC 710 heard on 10 March 2011. The Divisional Court in England upheld the lower court's decision that the appellant would not be at risk of suffering mistreatment sufficient to engage Article 3. In his skeleton argument counsel relied on the views expressed in R (Wellington) v Secretary of State of the Home Department [2009] 1 AC 335 by Lord Hoffman, Baroness Hale and Lord Carswell that a relativist approach to the scope of Article 3 seemed essential. Punishment which counts as inhuman and degrading in the domestic context would not necessarily be so regarded when the extradition factor had been taken into account. Their view was that the desirability of extradition is a factor to be taken into account when deciding whether the punishment likely to be imposed in the receiving state attains the minimum level of severity which would make it inhuman and degrading. In his oral submissions Mr Simpson very properly drew the court's attention to Strasbourg's rejection of the relativist approach in Harkins and Edwards v United Kingdom (Applications 9146-07 and 32650-07 delivered on 17 January 2012). Mr Simpson argued that the evidence that led to the judge's decision (even if it reflected the current situation) did not attain the minimum level of severity which would make the prison conditions inhuman and degrading. In relation to the risk of ill-treatment by staff and other prisoners there was no evidence of a failure to provide reasonable protection to prisoners. Counsel submitted that if the judge found a breach of Article 8 rights (though that was not clear) he had no basis for doing so.

[9] Mr Macdonald QC on behalf of the requested person argued that the judge's conclusion that the extradition of the requested person would be incompatible with

his Article 3 rights was unassailable. The evidence called by the requested person was the most recent evidence available and included the most recent reports of the various bodies which had investigated prison conditions in Lithuania as well as the written reports and oral testimony of Professor Morgan who visited the relevant prison during the currency of the proceedings specifically to update his report to the court. Professor Morgan had an unrivalled expertise and world class standing. The evidence showed a deteriorating trend not an improving one. Funding for improvements and maintenance was not available and the economic situation in Lithuania was difficult. Although there was a strong evidential case against the Lithuanian authorities, Lithuania called no evidence to contradict or undermine the evidence produced by the requesting person. Counsel submitted that the decision in Janovic was not binding on this court and was wrong. The judge had considered it carefully and explained his reasons for reaching a different conclusion.

The application to adduce new evidence

[10] Mr Simpson sought to have admitted in evidence a document from the Prosecutor General's office in Lithuania providing comments from the Ministry of Justice. Section 29 of the 2003 Act provides that on an appeal by a judicial authority the court may allow an appeal on specified conditions. These include in section 29(4) the case where evidence becomes available which had not been available at the extradition hearing and that evidence would have resulted in the judge deciding the relevant question differently so that he would not have been required to order the discharge of the person whose extradition was sought. Mr Simpson drew the court's attention to the Divisional Court decision in Szombathely City Court v Fenyvesi [2009] 4 ALL ER 324. That decision makes clear that the judicial authorities in the requesting state must show that the proposed fresh evidence had not been available at the extradition hearing and that it would be decisive. Evidence which was not available at the extradition hearing within section 29(4) of the 2003 Act means evidence which either did not exist at the time of the extradition hearing or had not been at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. In that case the judicial authorities seeking extradition had not shown that the proposed fresh evidence had not been available at the extradition hearing and that it would be decisive. The court indicated that the threshold for admitting fresh evidence is a high one.

[11] We concluded that the proposed new evidence should not be admitted. The appellant could not make the case that the proposed fresh evidence was not available at the extradition hearing. Nor had it shown that the proposed new evidence would be decisive. The appellant had ample opportunity to produce evidence before the judge of first instance to answer the strong case put forward by Professor Morgan. It did not do so and it did not provide its own counsel with any material on which to challenge or undermine Professor Morgan's evidence of which it had advanced notification.

The evidence relating to Lithuanian prison conditions

[12] It is highly likely that the requested person if extradited to Lithuania would be remanded in custody in the relevant prison. In addition in the course of the investigation for the alleged offences it is very likely that he would be detained for periods in police managed custody.

[13] So far as police managed custody is concerned Professor Morgan detailed the severe problems of overcrowding in police establishments. In its 2000 report the CPT found that there were problems of unhygienic multi-occupied cells, cells without natural light and inadequate lighting, severe overcrowding in some small cells, problems with heating and unbearable cold, the absence of outside exercise facilities, the lack of provision of basic hygiene items and poor and inadequate food. The CPT found in some centres the facilities were such that the prisoners were being subjected to inhuman and degrading treatment. In 2004 conditions for remanded prisoners in these facilities were found to be totally unacceptable. In 2008 conditions remained so bad as to be, in the CPT's view, inhuman and degrading. Such conditions could be endured for months. Professor Morgan gave unchallenged evidence that in his opinion it is very likely that if the requested person were extradited to Lithuania and held in police custody for a period (which would almost certainly be the case) or returned from the remand prison to police for further questioning he would be held in conditions amounting to inhuman and degrading treatment.

[14] In relation to conditions in remand custody in prison he might be held for months and years before trial. The conditions in the relevant prison were heavily criticised in the CPT reports of 2000, 2004 and 2008 and the CPT described how conditions in many of the cells gave rise to inhuman and degrading treatment of prisoners. The CPT carried out investigations in 2012 but it has not yet published its reports. The Lithuanian authorities would have received advance notification of its provisional findings and given the opportunity to comment thereon. No evidence was adduced by the Lithuanian authorities about their findings which presumably remain confidential in the meantime pending publication. The requested person clearly does not have access to that material.

[15] Professor Morgan gave evidence that the relevant prison is a multi-functional establishment with different sections for remand and sentenced prisoners. It was built in 1904. In February 2000 it was severely overcrowded: the official capacity was 1,200 but it was accommodating 1,712 prisoners, two thirds of them on remand. By the time the CPT returned in 2004 the capacity in the prison had been reduced to 864 places but it contained 1,208 prisoners of whom 1,040 or 86% were on remand. In 2008 the CPT found the prison to hold 1,002 prisoners occupying accommodation certified to hold 864. Three quarters of the population comprised remand prisoners. Although the population statistics indicated that the overall crowding had diminished the CPT nonetheless found parts of the prison to be outrageously overcrowded in some instances with 6 prisoners in a cell measuring approximately

8 square metres. The Lithuanian authorities conceded the fact that all the remand prisons in Lithuania are overcrowded. The minimum space standard per prisoner to which they aspire (3 square metre per prisoner) is well below that which the CPT considers an absolute minimum requirement in shared accommodation (4 square metre per prisoner) and achievement of that inadequate standard is in any case dependant on raising private funding, a prospect which appears unlikely in current financial circumstances.

[16] While there had been an improvement in the condition of cells there was still severe overcrowding. Cells measuring approximately 8 square metres including a lavatory with a waist level partition were being used to accommodate up to 6 prisoners. The CPT report indicated that there was little room for furniture apart from bunk beds. The waist level partitions in the lavatories were not sufficient to provide real privacy or to dispel the impression that prisoners were obliged to eat, sleep and spend up to 23 hours a day, in a space which also served as a lavatory. In some larger cells in Unit 1 the lavatories were not partitioned at all. Buildings 2 and 3 had not yet been renovated. The conditions of detention remained very poor. Unhygienic conditions were exacerbated by the fact that prisoners were not provided with personal hygiene products (eg soap, tooth brush, toilet paper etc) and indigent prisoners were not always provided with proper clothing. Prisoners were only allowed out one hour a day for outdoor exercise taken in small yards measuring 23 square metres insufficient for them to exert themselves physically. These were judged by the CPT to be oppressive. In the 2008 report the CPT concluded that the combination of overcrowding, poor material conditions and lack of out of cell activities which remand prisoners might have to endure for months could reasonably be described as inhuman and degrading. In the overcrowded conditions combined with the presence of few staff there is a good deal of inter-prisoner violence.

[17] During a visit to the relevant prison in 2010 where Professor Morgan interviewed the requested person's brother the Professor noted that the structure of the wings including the size of the cells remained exactly the same as before. That meant that if they were as extensively used as at present and if the regime remained unchanged the cells were just as crowded for 23 hours a day in which the prisoners are confined in them. He noted that the Director of the prison explained that prisoner numbers were rising again and the state of the Lithuanian economy meant that there was no budget to make further improvements. The Director explained that he was generally powerless to greatly improve matters. On 25 May 2010 the prison according to the Director held 1,044 prisoners a substantial increase on the 2009 figure of 950. Professor Morgan found no reason to alter the conclusions he reached in his earlier report. Most remand prisoners in effect are subject to approximately 2 square metres of cell space per person, well below the standard deemed acceptable by the CPT. Prisoners are required to meet the needs of nature without privacy in those cells and they are confined to their cells for 23 hours a day. No prisoner work is provided and they are required to exercise in small cages not large enough for them to exert themselves physically. Professor Morgan concluded

that the conditions remain inhuman and degrading according to the standards of the CPT as endorsed by the European Court.

[18] The report of the Seimas Ombudsman dated 30 January 2009 linked overcrowding in the prisons to a number of issues including tension amongst prisoners increasing, the number of cases of the use of violence, self-injury and suicides also increasing. The proportion of prisoners to staff has deteriorated resulting in less effective supervision. In some cases some of the responsibilities for keeping order are transferred to the prisoners. This causes constant stress for the officers and results in more frequent conflicts between officers and prisoners. The Ombudsman's report indicates that the government recognised that if improvements were not implemented the run down state of the prison accommodation would cause risk to people's health and life. Dissatisfaction of prisoners could possibly turn to mass riot. The failure to improve living environment and health care for prisoners could result in the failure to prevent the spread of various medical issues or problems.

The Strasbourg decision in Savenkovas v Lithuania

[19] In Savenkovas v Lithuania [2008] ECHR 1456 the ECHR addressed the conditions at the relevant prison in paragraphs 80-82 thus:

> "(80) The court notes the parties' disagreement as to the extent of the overcrowding at the Lukiskes Remand Prison at the material time. However, the court has been assisted in this matter by the objective reports of the CPT …
>
> (81) The applicant claimed that 2-8 persons had to share a cell of about 9 square metres, all the detainees being confined to the cell for most of the day. The Government contended that there had been some 2.86 metres of floor space per person in that institution at the material time. However, the court notes that the CPT found less available space during its visit in 2000 – 1.3 square metres per person – which had further deteriorated by the time of their second visit to that prison in 2004 to 1.16 square metres paragraphs 64 and 68 above. Whilst each person apparently had a bunk bed to sleep on the court observes that the overcrowding was just as severe as that condemned in the aforementioned Kalashnikov v Russia case (.9-1.9 square metres …). Moreover each cell at Lukiskes had an open toilet without sufficient privacy. In addition as a remand prisoner the applicant had

> been obliged to stay in such cramped conditions some 23 hours a day with no access to work or education or recreational facilities …
>
> (82) It is true that the applicant did not suffer any palpable trauma as a result of these conditions. Nevertheless, the court finds that they failed to respect basic human dignity and must therefore have been prejudicial to his physical and mental state. Accordingly, it concludes that the severely overcrowded and unsanitary conditions of the appellant's detention at the Lukiskes Remand Prison amounted to degrading treatment in breach of Article 3 of the Convention."

Conclusions

[20] We are satisfied that the judge understood and applied the proper test to be applied in determining whether the extradition of an individual would infringe his Article 3 rights. The test stated in Soering v UK is whether there is sufficient evidence of a cogent nature to establish substantial grounds for believing that the requested person would face a real risk of being subjected to treatment contrary to Article 3 if removed to the relevant State in this case Lithuania. The responsibility of the contracting State is to safeguard him against such treatment in the event of expulsion.

[21] The court in Harkins and Edwards v United Kingdom rejected as erroneous the proposition espoused by a majority of the court in R (Wellington) v Secretary of State [2009] 1 AC 335 that in the case of a removal of an individual on the basis of extradition the desirability of extradition is a factor to be taken into account in deciding whether the treatment likely to be imposed in the receiving state attains the level of severity necessary to amount to a violation of Article 3. Strasbourg confirms that the same approach must be taken in the assessment whether the minimum level of severity has been met for the purposes of Article 3 irrespective of the nature of the expulsion.

[22] Before a state can be held to be in breach of Article 3 rights of an individual the level of ill-treatment must reach a serious level. As Lord Hope stated in R (Pretty) v DPP [2002] 1 ALL ER 1 at 60:

> "Only serious ill-treatment will be held to fall within the scope of the expression inhuman and degrading treatment."

[23] Lord Scott (who rejected the majority erroneous relativist approach) stated in Wellington at para [42]:

> "It must, in my respectful opinion, be borne in mind that Article 3 was prescribing a minimum standard of acceptable treatment or punishment below which the signatory nations could be expected not to sink but not as high a standard as that which many of those nations might think it right to require for every individual within their jurisdiction and, therefore, entitled even if only temporarily to their protection. Article 3 was prescribing a minimum standard, not a norm. It must be open to individual states to decide for themselves what, if any, higher standard they would set for themselves. Lord Hoffman referred (paragraph [27] of his opinion) to a decision of the Court of Session which ruled that in prisons in Scotland the practice of slopping out was or might be an infringement of Article 3. This decision illustrates very well the point I am trying to make. It would of course be unexceptionable for the courts of Scotland or the courts of any other jurisdiction or their prison authorities to rule that the practice of slopping out was unacceptable and should cease but to give that ruling as an interpretation of an Article 3 obligation would in my opinion undermine the absolute nature of the obligation in question. It would be unthinkable to rule that in those circumstances could slopping out in a prison or comparable institution be tolerated. Whatever view one might have about the objectionable quality of slopping out, that view could not in my opinion be carried forward into an acceptable interpretation of an absolute obligation in Article 3."

This approach accords with what Strasbourg states in Harkin at paragraph 129:

> "However, … the court would underline that it agrees with Lord Brown's observation in Wellington that the absolute nature of Article 3 does not mean that any form of ill treatment will act as a bar from removal of a contracting state. As Lord Brown observed, this court has repeatedly stated that the Convention does not purport to be a means of requiring the contracting States to impose Convention standards on other States. … this being so, treatment which might violate Article 3 because of an act or omission of a contracting state might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case …"

[24] In the context of a case involving a consideration of whether the subjection of a returned person to relevant prison conditions would infringe his Article 3 rights, it is the overall context of the prison conditions which must be considered. This is a point made clearly in Re Napier [2005] SC 229 (the so called "slopping out" case) and in this jurisdiction in Re Karen Carson [2005] NIQB 80. Although the House of Lords focussed on the slopping out aspect of the Scottish case and clearly seemed to raise a question as to whether the Scottish court justifiably concluded that the practice of slopping out was a breach of Article 3 it is clear from a proper reading of the judgment of Lord Bonhomy that it was a combination of vices which resulted in a finding of breach of Article 3, not simply slopping out. These were the vices of overcrowding, bad lighting, bad ventilation, lack of privacy during excretion, slopping out and impoverished regime. It was a combination of these circumstances which led to the conclusion of a breach of Article 3 and, interestingly, of Article 8 (a point not addressed in the present case). Lord Bonhomy, applying Raninen v Finland (1997) 26 EHRR 563, concluded that detention of the prisoner and the squalid conditions found there subjected him to degrading conditions in relation to his private bodily functions and that of itself infringed the Article 8 right. His detention in such conditions was not necessary in a democratic society for the purposes of Article 8. In Re Karen Carson although a prisoner did have to slop out on occasions she had a much higher degree of privacy, had easy access to ordinary toileting during day time and good hygienic conditions. Her overall conditions were found not to infringe Article 3 or Article 8.

[25] The Strasbourg jurisprudence shows that when prison conditions fall below the minimum level of acceptability the prisoner will fall to be treated as having been subjected to inhuman and degrading treatment. Strasbourg put the position thus in Kudla v Poland (GC) No 30210-96:

> "The court has consistently stressed that the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with the given form of legitimate treatment of punishment. Measures depriving a person of his liberty may often involve such an element. The state must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the executional measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that given the practical demands of imprisonment his health and wellbeing are adequately secured."

[26] The compelling and uncontradicted evidence relating to conditions at the relevant prison is such that the judge was right to conclude that it had been established that there was a real risk that if returned to Lithuania the requested

person would be subjected to serious ill-treatment falling within the scope of the expression inhuman and degrading treatment. As the Strasbourg case law demonstrates there is a violation of Article 3 even in the absence of an intention to debase or humiliate if the measures adopted at the relevant prison are implemented in a manner which causes feelings of fear, anguish and inferiority (see Peers v Greece, Harkin and Jenkins and Savenkovas). While it might be possible for the prison authorities in Lithuania to ensure that the requested person would be incarcerated in an uncrowded cell with adequate facilities so as not to give rise to a breach of Article 3 it is clear from evidence that there are substantial parts of the relevant prison where conditions are such that prisoners' Article 3 rights would be breached. The Lithuanian authorities have given no assurance or indication that the requested person would in fact be housed in suitable conditions compliant with the Convention obligations.

[27] As noted Mr Simpson strongly contends that there was no up to date evidence to show that if extradited the requested person would now face inhuman and degrading treatment. This submission fails to take account of a number of aspects of the uncontradicted evidence. Firstly, the problem of overcrowding which in the past as described in the 2004 and 2008 CPT reports gave rise to inhuman and degrading treatment had not altered in 2010 when Professor Morgan visited the prison. He stated without contradiction that overcrowding had got worse in 2010. The Director of the prison frankly admitted to Professor Morgan that the prisoner numbers were rising again and that the current state of the Lithuanian economy was such that there was no budget to make further improvements. In its 2008 report the CPT, contrary to its recommendations in 2000 and 2004, found little improvement had been made in providing out of cell activities and prisoners were still required to spend 22½ hours a day in cells. At paragraph 44 of its 2008 report the CPT stated:

> "44. At Lukiskes Remand Prison material conditions varied considerably from one part of the prison to another. The best conditions were to be found in the recently renovated sections (in particular Wing 1 of Building 2 containing approximately 60 cells). However, the cells were still overcrowded, sometimes to an outrageous degree (for example up to 6 prisoners in a cell measuring approximately 8 metres squared). In the sections which had not been renovated (Building 3 and most of Wing 2 of Building 2) conditions – which were described as very poor in the report of the 2004 visit – had deteriorated to the extent that they could be described as deplorable (dilapidated cells and furnishings, poor ventilation etc). Some of the cells were dirty. Furthermore, several prisoners complained that buildings were not sufficiently heated in winter.

> In the CPT's opinion the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of programme of out of cell activities, (see paragraph 48) could be considered to be inhuman and degrading, especially when prisoners are being held under such conditions for prolonged periods (ie up to several months).
>
> The delegation was informed that there were plans to build a new remand prison near Vilnius and to close Lukiskes Remand Prison in 2011 (sentenced prisoners would be transferred to Pravieniskes – (2 Correction Home No1). The CPT welcomes these plans and recommends that the Lithuanian authorities implement them as quickly as possible. In this regard the CPT would like to receive a detailed schedule concerning the construction to ask commissioning of the new remand prison in Vilnius."

[28] There is no evidence or suggestion by the Lithuanian authorities in the present case that the plan to build a new remand prison has progressed or that Lukiskes has closed down or is likely to close down in the near future. The comments of the Director of the relevant prison to Professor Morgan suggest quite the contrary. The picture which emerges from the evidence is that the problems identified by the CPT in 2000, 2004 and 2008 have not fundamentally been resolved and in some respects the situation is getting worse. Even if conditions in some cells such as those in the renovated wing are such that the treatment of remand prisoners there may well fall short of being inhuman and degrading (although the CPT does comment on the continuing severe overcrowding *throughout* the prison) there is a real risk and indeed probability that during at least a significant part of this remand (which may well be lengthy as is borne out by the length of the remand of the requested person's brother on similar charges) the requested person would be detained in parts of the prison where the conditions are such as to give rise to a breach of Article 3. In a continuing situation demonstrating deterioration rather than improvement and an economic situation showing a lack of resources to counter that trend, the common sense inference to be drawn is that the conditions already condemned as inhuman and degrading by Strasbourg still prevail, at least in parts of the prison to which the returned person may very well be exposed.

[29] Mr Simpson submitted that the judge failed to properly take account of the presumption that a Convention State like Lithuania which is a signed up party to the European Arrest Warrant system would comply with its Convention obligations. We must conclude that any assumption or presumption that is to be applied has

been rebutted. In KRS v UK Application No 32733/08 2 December 2008 the European Court of Human Rights stated *that in the absence of proof to the contrary* it has to be presumed that Greece would comply with its Convention obligations and secure the rights to be found therein including the guarantees under Article 3. Mitting J in R (Jan Rot) v District Court of Lublin, Poland [2010] EWHC 1820 Admin took the view that there was effectively an irrebutable presumption that Category 1 Convention countries would comply with their Convention obligations and that for the purposes of Article 2 and, if relevant Article 8, the treatment of the extradited person was a matter between the individual extradited person and the receiving state and not between him and the United Kingdom. Mitting J's approach was to apply a presumption that the extraditing state would comply with its Article 3 obligations.

[30] In Re Targosinski [2011] EWHC 312 Admin Toulson LJ stated at paragraph 10:

> "If the Strasbourg Court were to find that conditions in a particular state systemically contravened prisoners' rights I can readily envisage a defendant who faced an application for an extradition order relying on such a judgement in order to displace the presumption referred to in KRS. I instance this as an example where a defendant would be able to place cogent material before the English court to displace the presumption. The second reason I mention it is because it has direct relevance to the present case. There is no cogent or satisfactory evidence in this case to demonstrate that the conditions criticised in the Strasbourg court during the period up to May 2008 still obtain in Poland or that this appellant's extradition would involve a contravention of rights."

In Agius v Court of Magistrates Malta (2011) EWHC 759 at paragraphs 32 and 33 Maddison J said:

> "32. It must therefore follow that a court would be wrong to proceed on the basis that because the requesting territory is Category 1 territory the court need not, absent exceptional circumstances examine the compatibility of the proposed extradition with the human rights of the person concerned. That examination should take place in every case to which Section 21 applies.
>
> 33. In making that examination however a court may legitimately assume that a signatory to the

> European Convention will comply with it. That assumption is rebuttable but only by cogent evidence satisfying the stringent tests referred to in paragraph 24 of the speech of Lord Bingham in the case of Ullah to which My Lord Sullivan LJ has referred."

[31] Unlike the situation in Targosinski in the present case the requested person has placed before the court cogent material to displace the presumption that the requested person's Article 3 rights would be vindicated and protected during his likely detention in the relevant prison. There is convincing evidence, which is fortified by the drawing of reasonable inferences flowing from the evidence, that the conditions criticised by Strasbourg in Savenkovas still obtain at the relevant prison.

[32] We recognise that the conclusion which the judge reached and with which we agree differed from that reached by the Divisional Court in England in Janovic v Prosecutor General's Office Lithuania [2011] EWHC 710. On the evidence adduced before the judge Professor Morgan was clearly making the case and the CPT had found that the combined effect of the conditions at the relevant prison amounted to inhuman and degrading treatment. The English Divisional Court appears to have interpreted Professor Morgan's evidence as adduced before the English court as suggesting that he was not using the terminology "inhuman and degrading treatment" in the legal sense. In the instant case, the judge had to interpret the evidence as adduced before him and the evidence before him justified his conclusion. In Janovic the court concluded that the Professor's assertion that the prison conditions were inhuman and degrading did not mean that his extradition to Lithuania would inevitably involve a breach of Article 3. The question is not whether a breach of Article 3 is inevitable. Of course, it is true that the requested person may be granted bail (but this seems to be very unlikely in view of his having left Lithuania and left the Republic of Ireland in breach of bail conditions in that jurisdiction). Of course it is true that he might possibly be detained in the best conditions available in the relevant prison and that the prison authorities might possibly make a special exception for him in the manner of his treatment or the location and conditions his incarceration. There is, however, a very real risk and, in reality a strong probability, that absent of any assurance by the Lithuanian authorities to the contrary, he will be treated like all the other remand prisoners at the relevant prison and will be detained for at least significant parts of his remand (which may very well be lengthy) in the same type conditions as were categorised as inhuman and degrading in Savenkovas. An application of the Soering test leads us to the conclusion that, contrary to the view taken by the English Divisional Court, it would infringe the requested person's Article 3 rights to be extradited. The continuation by the Lithuanian authorities of conditions condemned by Strasbourg as infringing Article 3 does not betoken an adequate process within that state to vindicate the Article 3 rights of prisoners detained in the relevant prison.

[33] We feel compelled to conclude that applying the law as we currently understand it in the light of the Soering test, this appeal must be dismissed.